No. 11704

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PRIEST RAPIDS IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLEE

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v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINIONS BELOW

A memorandum opinion of Judge Schwellenbach is found at R. 175–181. An oral opinion of Judge Driver is found at R. 1133–1136. Neither opinion has been reported.

JURISDICTION

This is an appeal from a judgment entered on March 7, 1947 (R. 1147–1158) and amended on March 14, 1947 (R. 1161–1163). Notice of appeal was filed on June 6, 1947 (R. 1164).

The jurisdiction of the district court was invoked under the Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, April 11, 1918, 40 Stat. 418, 50 U. S. C. sec. 171, and section 201 of the Act of March 27, 1942, 56 Stat. 176, 177, 50 U. S. C. sec. 171 (a) (R. 107). The jurisdiction of this Court is invoked under section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether by acquiring all the land in an irrigation district the Government acquired the beneficial interest in the properties held by the district for the owners of land in the district and became entitled to legal title thereto without a further payment for the benefit of the former landowners.

2. Whether in a proceeding under the Declaration of Taking Act the sum deposited as estimated just compensation is to be credited toward satisfaction of the amount awarded as just compensation for the property taken.

STATEMENT

The judgment appealed from requires the United States to pay to the Priest Rapids Irrigation District $473,356 (the amount found by a jury to be the value of that part of the power properties of the District "not devoted and applied" to irrigation purposes), together with interest at the rate of six percent per annum from October 1, 1943 (R. 1147–1158).[1]

[1] On motion of the Government (R. 1159–1160), the judgment was thereafter amended to direct that the award be paid into the court below (R. 1161–1163) and not, as the original judgment di-

The proceeding which culminated in this judgment is the penultimate of a series brought by the United States to acquire the area needed for the Hanford Engineering Project. These commenced on February 23, 1943, when the United States filed in the court below a petition to condemn about 194,000 acres of land (R. 2–7). On the same day, pursuant to section 201, Second War Powers Act, 1942, 56 Stat. 177, 50 U. S. C. sec. 171 (a) the Government asked for and obtained an order entitling it to immediate possession of these lands (R. 10–16). On April 22, 1943, it filed an amended petition which enlarged the area to be taken to about 206,000 acres (R. 16–22). On the same day, the court similarly extended its order of immediate possession (R. 27–32).

Included in the property described in these petitions was all the land within the Priest Rapids Irrigation District.

The District embraced 15,950.39 acres. According to its assessment roll prepared in late 1942, only 3,552.13 of these were privately owned. The State of Washington owned 2,194.83 acres and the United States 38.16. But most of the land—10,165.27 acres—was in the hands of the District (R. 727).

In the hope of procuring private owners for this land (R. 754) the District in January 1939 had given Messrs. Miller and Adams, doing business as the Priest Rapids Development Company, an option to purchase all of it (R. 907, 908). The contract required them

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rected (see R. 1157), into the Superior Court for Benson County, Washington.

to pay the District $5.00 an acre for irrigable land and $1.00 an acre for that which was nonirrigable. However, the District would not construct additional irrigating facilities. Accordingly, no land could be sold as irrigable unless it could be served from existing facilities or unless the buyer would put in his own well (R. 759, 911–913). The company succeeded in selling 685 acres (R. 893). Most of these sales were made in 1940 and 1941 (R. 925).

In addition, the District held title to a power plant, a pumping plant, transmission lines, a power canal, a main irrigation canal and laterals, and auxiliary properties. The power plant was used to generate electricity for the pumping of water to the lands. However, the District supplied water to only a small part of its land: in 1942, for example, it irrigated only 1,200 acres (R. 345, 416, 820). In consequence, the plant generated much unneeded electricity (R. 1029). This surplus was sold to the Pacific Power and Light Company (R. 345, 568). Over the 11 years beginning with 1932, an average of 55 percent of the power plant's output was so disposed of (R. 1030). The proceeds of these sales were applied on the District's bonded debt and for maintenance of its facilities (R. 413–414).

So much for the history of the District before the United States began to acquire the lands needed for the Hanford Project.

In the interval between the filing of the original petition and May 12, 1944, the Government acquired by purchase and condemnation all the privately owned land within the boundaries of the District (R. 1081).

And it purchased from the Priest Rapids Development Company for $49,000 the more than 10,000 acres included in the option contract (R. 749, 921–922, 929).

Accordingly, on May 12, 1944, the United States filed an amended petition to condemn the remaining property held in the name of the District (R. 106–118). The petition stated (R. 117–118):

> That the real property * * * described * * * constitute [s] all of the operating properties and facilities owned * * * by the Priest Rapids Irrigation District * * *. That petitioner, United States of America, by reason of its ownership of all the real property lying within the boundaries of said * * * District is * * * the equitable owner of the real property * * * described * * *, subject only to the lien of the bonded indebtedness of said * * * District, and said * * * District * * * now holds legal title thereto in trust for the use and benefit of [the] United States of America. That the sum of $170,500.00 deposited in the registry of this court with the filing of declaration of taking * * * represents a sum which * * * is sufficient to pay and discharge all bonded indebtedness of said * * * District.

As indicated by its petition, the Government simultaneously filed a declaration of taking (R. 119–130) and deposited in the registry of the court $170,500, estimated to be just compensation (see R. 132). Pursuant to subsequent stipulations, bondholders were paid $169,850 of this deposit (R. 145, 151, 158), and the District was paid the remaining $650 (R. 218–219).

On February 12, 1945, the District answered the Government's petition (R. 161–167). It alleged that the properties had a value of $1,060,685; that between April 17, 1943, and October 1, 1943, they had been taken by the Government, and that thereupon the landowners who had been entitled to receive water became the legal owners of the property. It concluded that $1,060,685 was just compensation and that this sum, less the $170,500 deposited with the declaration of taking, should be paid to it for distribution to those who had owned land in the District on February 23, 1943 (the date of the first order granting immediate possession).

The consequent demurrer of the Government (R. 173–174) was sustained by District Judge Schwellenbach (R. 181–182). In connection with his ruling, the judge filed a memorandum opinion (R. 175–181).

This opinion rested upon the assumption that, when the United States paid the individual landowners the value of their lands, it had not quite compensated them for their interests in the property here involved. And, referring to earlier proceedings to ascertain just compensation for privately owned lands, it said (R. 178–179):

> The fact is that, in the first case which was tried, the landowner attempted to assert his claim to his proportionate share of the District's assets, the [United States] objected and I ruled against the landowner. * * * The awkwardness and the confusion which would have resulted [from a contrary ruling] was realized by counsel on both sides and dozens of cases have been tried since with the understand-

ing that, at some time, the question of the right of the landowners to their proportionate share of the value of the District assets would be thrashed out.

Nonetheless, the court recognized that the awards to the former landowners had been for the value of their lands. Thus, it said (R. 179–180):

> On the other hand, the landowners are not entitled to compensation for that portion of the District assets which was valuable only for irrigation purposes. *In each one of the trials and in all of the appraisals, the value of the separate tracts was based upon the proposition that they were within the irrigation district and had irrigation water available. Verdicts and settlements which have been made in these cases have been substantial. They have been based upon the land valued as irrigated land.* For the owners of the lands now to receive compensation for the District assets which were devoted to irrigation purposes would amount to double compensation. Furthermore, the Government has paid out to the holders of the bonds in the Priest Rapids Irrigation District $170,500. * * * Clearly it is entitled to offset the amount thus paid out against any claim for compensation for the District assets. [Italics added.]

It came to the following conclusion (R. 180):

> It seems to me that what must be done * * * is that the Districts[2] set up in their answers

[2] The same contention was made by the Richland Irrigation District whose assets have been likewise taken. Trial of that proceeding has been postponed until there has been a test of the correctness of the ruling in this case.

> their contention as to the value of that portion of the assets * * * which is not applicable to irrigation purposes and make claim for that amount after giving credit for the sums the petitioner expended in the payment of District obligations.

Thereafter, the District filed an amended answer (R. 182–190). It alleged that on February 23, 1943, it had title to property "not used exclusively in the delivery of irrigation water to property within the district" of the value of $847,815 (R. 185). It further alleged that on that date it also owned property used in the operation of its irrigation system of the value of $182,870, that the bonded debt was a lien on this property, and that the amount deposited by the United States should be credited against the value of these assets (R. 189–190). The United States again demurred (R. 191–192. And see R. 201–205). The demurrer was overruled by Judge Driver who had succeeded Judge Schwellenbach (R. 292).

The case came on for trial before Judge Driver, who adhered to the theory enunciated by Judge Schwellenbach (see e. g. R. 387–390, 702–706, 1017-1021). He instructed the jury that it should award compensation for property which was not "to any extent, devoted to irrigation purposes" and also for "that portion of the power properties of the defendant not devoted to irrigation purposes" (R. 1105). He added (R. 1105):

> You should first find the full, cash, market value of such electric power properties, namely, the power plant with its allied facilities and the

> power transmission line from the power plant to Coyote Junction. Then you should determine in what fractional part or percentage such power properties were devoted and applied to nonirrigation purposes at the time of taking, or which, in all probability, would have been so applied within the reasonably near future.

In respect of the method of allocation, the court instructed the jury (R. 1107):

> * * * you may take into consideration the generating capacity at the time of taking of defendant's power plant, the demands upon the plant for power to pump water to irrigate the lands then under irrigation in the district, or that in all probability would have been under irrigation within the reasonably near future, and the excess of power for commercial sale remaining after such irrigation demands had been met. You may also take into consideration any other pertinent facts and circumstances shown by the evidence, which may aid you in making such allocation.

In addition the jury was asked to find the value of that part of the District's properties used for irrigation purposes which, so the court charged, comprised "the pumping plant, the power transmission line from Coyote Junction to the pumping plant, the main and lateral irrigation canals" and the remaining part of the power plant and the transmission line to Coyote Junction (R. 1106).

The jury found that just compensation for the portion of the power properties not devoted to irrigation purposes was $473,356 (R. 1131) and that the

value of the properties devoted to irrigation purposes was $365,845 (R. 1132).

On March 7, 1947, the court entered judgment on the verdict (R. 1147–1158). It directed that the United States pay the District $473,356 with interest at the rate of six percent from October 1, 1943. It recited that just compensation for the properties devoted to irrigation purposes was $365,845, but that the Government's obligation in this respect was satisfied by the $170,500 it had paid for the bonds.

SPECIFICATION OF ERRORS

The statement of the points relied on by the United States on its appeal (R. 1169) may be summarized as follows:

The district court erred:

1. In holding that the District was entitled to receive compensation for the properties to which the District held title. Nos. 1–5.

2. In failing to apply the sum deposited as estimated just compensation by the Government toward satisfaction of the judgment entered upon the jury's award.

ARGUMENT

I

By acquiring at fair market value all the lands in the Priest Rapids Irrigation District the United States acquired the beneficial title to the properties held by the district for the owners of land in the district and was entitled to the legal title thereto without a further payment for the benefit of the former landowners

A. *The United States did not cause the former landowners to believe they would receive more than the*

fair market value of their lands.—At the outset, the Government would invite the court's attention to that part of Judge Schwellenbach's memorandum opinion which deals with his earlier ruling that an individual landowner could not by reason of his undivided share in the District's assets assert a right to an award in excess of the market value of his property.[3] The passage in question has been quoted in the statement (pp. 6–7, *supra*). Conceivably, the judge's remarks in respect of "awkwardness" and "confusion" convey the impression that the Government's objection, which provoked the ruling, was based on expediency rather than principle, that its position simply was that the owner's claim could not be appropriately asserted in that proceeding but should be postponed until this suit and that as a result individual landowners were misled and prejudiced.

In order to dissipate any such impression the Government prints as an Appendix to this brief (pp. 27–31, *infra*) the affidavit of Bernard H. Ramsey, Esq., Special Assistant to the Attorney General, who, since September 23, 1943, has been in charge of the litigation incident to the acquisition of the lands needed for the Hanford Project. The affidavit makes clear the following:

The Government's contention was made known before the first trial involving just compensation for an individual holding was begun. The Government

[3] The earlier ruling was made in the first of the proceedings to condemn the property of an individual landowner. The ruling was repeated on April 26, 1944. For a transcript of the proceedings on the latter occasion see R. 100–105.

was of opinion that the issue should be raised in that trial and that the ruling thereon should be tested by an appeal to this Court. And, in order to facilitate such appeal, it arranged to pay for the transcript of testimony in that case. The trial court sustained the Government's contention and refused to admit the evidence of value of the District's assets offered by the landowners. But the landowners did not appeal from the subsequent judgment. Since the Government could not complain of the judge's ruling, it was deprived of the opportunity to establish its correctness.

It is evident, therefore, that the United States was not party to an "understanding" that determination of the issue should be postponed until the present proceeding. On the contrary, as Mr. Ramsey's affidavit demonstrates, it sought to have the matter decided long since. And, of course, nothing done by the United States led any individual owner of land in the District to believe that a part of the just compensation due him remained unpaid.

B. *The United States has already paid the former landowners the fair market value of their lands.*—At this juncture it should also be pointed out that the owners of property in the District received full market value. This fact is made clear by the memorandum opinion of Judge Schwellenbach. As he said (R. 179):

> In each one of the trials and in all of the appraisals, the value of the separate tracts was based upon the proposition that they were within the irrigation district and had irrigation

water available. Verdicts and settlements which have been made in these cases have been substantial. They have been based upon the land valued as irrigated land.

Mr. Ramsey's affidavit amplifies the remarks of Judge Schwellenbach. He says (p. 30, *infra*):

> In the trial of these tracts, as well as subsequent tracts tried by the Court, the landowners were permitted to show that their lands were irrigated lands, the irrigation district in which they were located, the fact that ample water for irrigation was available, that the facilities of the district were in all respects adequate, any and all special services rendered by the district to the landowners, the per-acre charge imposed upon the land per year for irrigation services, the amount of acreage under the district, the amount of outstanding bonds against the district, *and all other factors which might be legally shown as affecting the value of the premises as between a prospective seller and a prospective buyer.* [Italics added.]

The result of this testimony is demonstrated by the awards made. To quote again from Mr. Ramsey's affidavit (p. 31, *infra*):

> Tract No. P–1274, owned by Alex Park, consisted of twenty acres of orchard land improved only with a two-room tenant house, packing shed, a well, and the ordinary irrigation facilities. At the time that possession of this tract was taken by the Government, the cherry crop growing upon the tract had been picked and marketed by the owner. The peach and apricot crops were matured but not harvested. The

trial jury fixed $30,500 as the fair market value of the twenty-acre tract, inclusive of the fruit crop not harvested by the owner. The other verdicts rendered by trial juries followed much the same pattern.

The highest price fixed by any trial jury upon lands adjoining the irrigation districts, not susceptible of irrigation but otherwise comparable to lands within the districts was $2.00 per acre.

Thus there can be no doubt that the former landowners have received in condemnation as much as they would have got from a voluntary sale.

C. *The properties of the District were wholly devoted to irrigation purposes and were inseparable from the lands they served.*—As has been pointed out pp. 7–8, *supra*) Judge Schwellenbach was of the opinion that the District was entitled to the value of so much of the property to which it had legal title as was "not applicable to irrigation purposes" (R. 179). Judge Driver's instructions to the jury presumably defined the property Judge Schwellenbach had in mind. So, he instructed it to award to the District that part of the "full, cash, market value" of the generating plant and ancillary facilities that was "devoted and applied to nonirrigation purposes" (R. 1105, and see pp. 8–9, *supra*). This fraction, the jury was further told, was to be determined by considering the demands for power to irrigate (at the time of the taking or within a reasonable time thereafter) and the excess of power remaining available for commercial sale (R. 1107, and see p. 9, *supra*). In short, the jury was instructed to determine what percentage of the total power gen-

erated was sold rather than used, to apply that percentage to the "full, cash, market value" of the generating facilities, and to award the result to the District for the benefit of the former landowners.

In thinking that the District had generating facilities "not applicable to irrigation purposes," Judge Schwellenbach made the fundamental error. There is no basis for this concept. It purported to rest on the fact that the District generated and sold power unneeded for pumping irrigation water. But obviously this circumstance did not operate to divorce any part of the generating facilities from the irrigation project. In the first place, it is to be remembered that these generating facilities—all of them—were designed and intended to supply the irrigation needs of those owning lands in the District. These needs might be increased at any time. In such case they would have to be satisfied by use of additional power. Meanwhile, the excess power could be sold. But, if the District were to fulfill its purpose, the arrangement could not be permanent. Furthermore, the revenues from sales of excess power were used to pay the annual charges on account of bonds and maintenance. The burden on the privately owned lands was correspondingly lessened. The effect was the same as if more lands in the District had returned to private ownership. It is clear that payments by such new landowners would be for irrigation purposes. Payments out of sales revenues, similarly applied, were made for the same object. Certainly, the *source* of the funds is immaterial. Plainly, therefore, the generation and sale of surplus

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power by the District was for the purpose of irrigation. It follows that the generating facilities of the District were wholly devoted and applied to that purpose.

The validity of this conclusion is illustrated by consideration of the trial court's effort to make an apportionment of the generating facilities. Necessarily the court went on the theory that, despite payment to the former landowners of the value of their properties, they had retained an interest in the assets of the District. If this were so, that interest must have been severable from the land. Put otherwise, the theory must have been that, prior to the taking, individual landowners could sell lands in the District and retain their interest in part of the generating facilities. This, in the nature of things, was impossible for two reasons.

First, when regard is had for the fact that the proceeds from sales of excess power were applied to discharge the bonds and maintenance charges of the District, it is obvious that no one would buy such an "interest." For he would get no return upon his purchase.

Second, such an interest could not have been identified or in fact valued. This is apparent from the instructions given the jury below. Presumably, it was determining the price which the former landowners as a group and a prospective buyer or buyers would have put upon this interest. As has been pointed out (pp. 14–15, *supra*) this figure was arrived at by appraising the market value of the whole of the generating facili-

ties and applying to that value a percentage derived from a comparison of the use of power for irrigation and the commercial sale of the remainder. In other words, the jury found that a *fraction* of the plant had been retained by the former landowners. Property more elusive in character can scarcely be imagined. It could not be identified or segregated; it was a part of each of the structures and of each piece of the equipment used for generating and transmitting power. And, of course, the interest of each landowner of the group in this fraction was even more derivative; it depended on the relation between the number of acres he owned and the total number of privately owned acres.

It is highly fanciful to suppose that a landowner would try to separate from the land—and retain—such an interest in this aggregate of structures, that anyone else would want the land subject to such imponderables, or that a prospective seller and buyer would embark upon an enquiry like that which engaged the jury in this case.

In the light of these considerations, there can be no escape from the conclusion that, as the Government contends, the interest in the generating facilities of the District is appurtenant to the land, incapable of separate valuation and consequently taken into account in fixing the selling price of the land.

D. *In parting with their lands in the District, the former owners divested themselves of all interest in properties held beneficially by the District for landowners.*—If anyone lacking the power of eminent

domain had purchased the 3,552.13 acres individually owned in the District, none would doubt that the purchaser had *ipso facto* acquired all the assets of the District and that the former owners had lost all their interest in the same. Yet, notwithstanding the United States, possessing that power, has acquired all the lands in the District (and paid the former owners the full market value thereof), the court below has held it would have to pay an additional amount for their benefit. The error of this unjust ruling is made manifest by the decision of the Supreme Court of Washington in *In re Horse Heaven Irrigation District,* 11 Wn. 2d 218, 118 P. 2d 972 (1941).

That case may be summarized as follows:

The Horse Heaven Irrigation District has been "disorganized" pursuant to Rem. Rev. Stat. secs. 7526–7530. At the time of dissolution, the greater part of the land had passed to the District through foreclosure of liens for unpaid bond assessments. This land was claimed by the owners of the land remaining in private ownership. The claim was contested by the former owners; they contended that it should be divided among all who had paid assessments during the life of the District. Section 7530, Rem. Rev. Stat., prescribed the method of distribution. The court observed (11 Wn. 2d at p. 227), that if the section were given the construction advanced by the assessment payers—

> the result may well be, so far as the *property holders* of the irrigation district are concerned in the distribution of the assets of this dissolved district, that those assets will be dis-

> tributed to persons who are not owners of the assets of the district; in other words, their property will be taken from them without due process of law.

For, as the court went on to say (p. 227):

> An irrigation district is a corporation which * * * owns and uses its property in a strictly proprietary capacity for the primary benefit of the owners of land included within the district. With the acquisition as owner of land in an irrigation district, that owner immediately acquires an interest in all property of that district. When the district ceases to be a district, the interest of that owner is as definite and certain as is the interest of a shareholder in an ordinary corporation.

Accordingly, the court held that distribution should be confined to those who owned land in the District at the time it was dissolved.

As the cited decision states: "With the acquisition as owner of land in an irrigation district, that owner immediately acquires an interest in all property of that district." So here, by each acquisition of land in this District the United States immediately acquired an interest in the assets of the District. By the same act and at the same time the former owner necessarily was divested of his interest in those assets. And when finally the United States acquired *all* the privately owned land in the District and all of the former owners in consequence had been divested of their respective interests in the District's assets, the United States became the sole party having an interest in the District's property. Having acquired the

complete interest, it was in fact the owner. Being the owner it was entitled to legal title to the property without paying any additional amount. The holding below that the United States must pay a further sum for the benefit of the former landowners is in effect a holding that the property should be distributed among those who—in the words of the Supreme Court of Washington—"are not owners of the assets of the district." It is clearly wrong.

E. *The Government's liability to the landowners would have been the same if the District-held properties had been taken before rather than after the privately owned lands.*—In acquiring the privately owned lands before it sought legal title to the property held by the District, the United States adopted the method most calculated to insure justice and prevent the unnecessary expenditure of time and money. Under such a course the landowners were individually compensated by payment of the full market value of their property instead of being compelled to wait for their aliquot shares of the assets of an irrigation district about to become defunct. And—except for the rulings of the trial court now under review—there would have been no occasion for undertaking the lengthy, costly process of evaluating the generating plant and auxiliary structures of the District.

Nonetheless, Judge Schwellenbach seemed to believe that, if the Government had reversed the order of taking and so first condemned the District-held property, it would have been compelled to pay the value of that property and in addition the amounts it has paid

for the privately owned lands (see R. 177). There was no basis for this belief.

For example, if the Government had condemned the District property subject to its obligations to the privately owned land, no payment of money would have been made. The constitutional requirement of just compensation "means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304 (1923). Extinction of the bare legal title of the District would not have altered its pecuniary position. Nor would the landowners have lost anything: They would still receive necessary power and have the revenues derived from surplus sales applied for their benefit. Accordingly, their lands would continue to be worth as much as before. And when the Government had condemned them, it would have paid for them as irrigated lands. In other words, the measure of compensation would be the same as that for which the Government now contends.

If, however, the District property had been taken freed from its obligations to the privately owned lands, the Government would have been required to pay its value. But in that event the privately owned lands would have been no longer irrigable and would have lost most, if not all, of their value. And the Government's pecuniary liability to their owners would have been correspondingly reduced. Thus, while the total which the Government would have to pay might—and in the nature of things, almost

certainly would—be more or less than the amount here paid for the lands, the difference would result from the varying judgments of juries and not because just compensation was differently measured.

It is submitted, therefore, that by virtue of its acquisition of the privately owned lands in the Priest Rapids Irrigation District the United States acquired the beneficial title to the properties held by the District and was entitled to the legal title without further payment.

II

In any event the judgment upon the award should have been reduced by the amount of estimated just compensation deposited with the declaration of taking

The jury found that "the just compensation to be paid for the taking of that portion of the properties of the * * * District not devoted and applied to irrigation purposes is $473,356.00" (R. 1123). When it filed the declaration of taking, the United States had deposited as estimated just compensation $170,500. Nonetheless the judgment appealed from, directs the United States to pay the District $473,356, with interest at the rate of six percent from October 1, 1943, until paid (R. 1157).

Even under the trial court's theory of allocation of values, this calculation of the judgment was clearly wrong. Despite the Declaration of Taking Act, it ignores the purpose and function of the deposit of estimated just compensation and it contravenes the provision of that Act declaring the manner of judgment to be entered in cases in which a declaration of

taking is filed and a deposit made of estimated just compensation.[4]

The purpose and function of the deposit has been aptly put by the Supreme Court. It has said: "When the declaration is filed the amount of estimated compensation is to be deposited with the court, to be paid as the court may order 'for or on account' of the just compensation to be awarded the owners." *United States* v. *Miller,* 317 U. S. 369, 381. So here, the $170,500 was deposited by the United States "for

[4] Section 1 of the Declaration of Taking Act, approved February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258 (a), provides in part:

"Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency."

or on account'' of the $473,356 awarded the District. In entering judgment for $473,356, the court below has failed to take the deposit into account—and so ignored the Declaration of Taking Act.

And the Act is equally explicit as to the judgment which is to be entered when the award exceeds the deposit. It provides: "If the compensation finally awarded in respect of said lands * * * shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the *deficiency.*" [Italics added.] So here, the court below was directed to enter judgment for the difference between $473,356 and $170,500. In entering judgment without regard for the difference it has not followed the Declaration of Taking Act.

Instead, the judgment purports to make the $170,500 a "charge against the Irrigation properties only'' and goes on to say that "no other sum shall be paid * * * for the taking of said irrigation properties" (R. 1149). And in an opinion delivered orally on the occasion of entering the judgment (R. 1133–1136) the trial judge said that since in the cases trying the value of the individually owned lands evidence of the amount of the District's bonded debt had been submitted he was of opinion that the awards in each of the cases had been for the market value of the land *minus* its share of the debt. Thus, as the Government understands the trial court, it was the latter's view that the judgments in closed cases were too low and that (although they had not been appealed from) the present proceeding with its de-

posit of $170,500 afforded an opportunity to redress the balance.

The United States cannot concur in the idea that evidence as to the size of the District's debt reduced the aggregate awards to private landowners by the same amount. But the correctness of that speculation is immaterial here. For the filing of this declaration of taking and the accompanying deposit of the $170,500 did not reopen these earlier cases. See e. g. *United States* v. *111,000 Acres of Land,* 155 F. 2d 683, 685, *et seq.* (C. C. A. 5, 1946). On the contrary, this deposit was made "for or on account" of whatever award might be made in this proceeding. It could not be diverted to other purposes. And, in making other use of it, the trial court erred.

The error is illustrated by supposing that, instead of depositing $170,500 for the bondholders of the District, the United States had deposited—as would have been consistent with its position—one cent. In that event, it is supposed that the trial court would not have troubled to assign this trifle to the "irrigation properties." Or, had it done so, the United States would not have complained. Neither would the court have had any basis for entering judgment against the United States for more than $473,356. Yet for all purposes the United States, according to the judgment below, is in no better position than if, instead of $170,500, it had deposited one cent. Something has turned out badly. Obviously, $170,500 cannot be so dissipated. It should have been applied to reduce the judgment entered on the award.

It is submitted, therefore, that in any event the judgment should be reversed with directions to reduce its amount by $170,500.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed and the cause remanded with directions to enter a judgment for a nominal amount or, in any event, for an amount which will take into account the sum deposited as estimated just compensation.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.

BERNARD H. RAMSEY,
Special Assistant to the Attorney General,
Yakima, Washington.

JOHN F. COTTER,
Attorney, Department of Justice,
Washington, D. C.

FEBRUARY 1948.

APPENDIX

STATE OF WASHINGTON,
County of Yakima, ss:

I, Bernard H. Ramsey, being first duly sworn, on oath depose and say: That I am a Special Assistant to the Attorney General assigned to duty with the Lands Division of the Department of Justice, and in such capacity I am now, and have been since September 7, 1943, in charge of the work of the Department of Justice for the acquisition of lands by condemnation in the Eastern District of Washington; that included in said acquisitions was and is the case of *United States* v. *Clements P. Alberts et al.,* Civil No. 128; that in this case, and on the 15th day of May, 1943, the Priest Rapids Irrigation District filed a motion in the District Court of the United States for the Eastern District of Washington in the case of *United States* v. *Clements P. Alberts et al.,* for an order of the Court requiring the Government to first file its declaration of taking against the properties and assets of the Priest Rapids Irrigation District, and first try out the issue of the value of the district's properties prior to the trials for the purpose of determining the value of privately owned lands within the Priest Rapids Irrigation District; that on May 28, 1943, the State of Washington, as the holder of the bonds of the Priest Rapids Irrigation District, moved the Court for leave to intervene and join in this motion; and that on May 29, 1943, the Court entered an order permitting the State of Washington to intervene in the proceeding for that purpose.

That on this issue of sequence of trials, extensive briefs were filed, both by the attorneys for the district and by the Government, and that through said briefs the Government fully and fairly set forth its position and its contention that with the acquisition of the privately-owned lands within the district the Government would acquire, as a matter of law, all of the equitable rights of the former owners in and to the district properties and facilities and would acquire the legal title thereto upon the dissolution of the district. The Goverment further set forth its position and contention that if the Government first acquired all of the facilities of the district, it would thereby deprive the lands within the district of all water rights and facilities for irrigation and would thereby convert the privately-owned lands within the district from irrigated agricultural land to desert lands of purely nominal value, and that the value of the privately owned lands could then only be fixed upon the basis of dry desert grazing land.

That on July 17, 1943, Judge Schwellenbach, in a memorandum letter addressed to Mr. Connelly, United States Attorney, a copy thereof being transmitted to Moulton & Powell as attorneys for the district, stated:

> I am preparing this sketchy memorandum to be used in the event Mr. Littell should come before I return. In that event, I would like to have a meeting with Ramsey, Crowley and yourself on one side, and Moulton & Powell on the other. In reference to the motion submitted by Moulton & Powell urging that a hearing be held to ascertain the value of the assets of the irrigation district prior to the trials of the various cases involving the individual tracts of land, as you know, it was impossible for me to get to the questions of this motion until Thursday. I had anticipated fully considering the motion before leaving. However, that

> seems to be impossible, and, as I go into it, I feel it impracticable. The motion assumes that the Government will condemn the various assets of the irrigation district. As I read the briefs, it would seem that this assumption is erroneous. It appears to me that the Government takes the position that these assets go with the land, and that as the Government has acquired by condemnation all of the land in the district it then becomes the owner of the dam and power installations, the water rights and any other assets. It seems to me that the Government contends that when that point has been reached there would be no necessity for any condemnation against the assets of the district.

That the Court overruled the motion of the Priest Rapids Irrigation District to require the Government to first proceed against the district properties, and the trial of the first of the lands in private ownership was had in October, 1943; that numerous conferences were held between Court, counsel for the district and Government counsel prior to these trials, and that it was assumed by all that the cases would be appealed to the Ninth Circuit Court of Appeals on the refusal of the Court to permit the landowners to introduce evidence as to the alleged cash value of the assets of the district; that the Court felt that this legal question should be determined by an appropriate appeal before the trial of the very large number of individually owned tracts involved in this proceeding; that the Department of Justice concurred with the Court upon this matter, and authority was obtained from the Attorney General to pay for the transcript of testimony in the proceeding, as well as other incidental costs upon appeal, in order to relieve the defendants of these costs; that a complete record was made in this proceeding which involved Tracts No. L–903, P–1274, P–1336 and Q–1425, Ernest H. Dietrich, Alex Parke, C. I.

Wright and Winfield F. Show being the owners of said tracts. The record of the trial was voluminous since all of the defendants' offers of proof were made a part of the record. However, no appeal was ever taken.

In the trial of these tracts, as well as subsequent tracts tried by the Court, the landowners were permitted to show that their lands were irrigated lands, the irrigation district in which they were located, the fact that ample water for irrigation was available, that the facilities of the district were in all respects adequate, any and all special services rendered by the district to the landowners, the per-acre charge imposed upon the land per year for irrigation services, the amount of acreage under the district, the amount of outstanding bonds against the district, and all other factors which might be legally shown as affecting the value of the premises as between a prospective seller and a prospective buyer. The ultimate question of value of the properties was established by expert value witnesses who stated their opinion as to the fair market value of the property as of the date of the filing of the declaration of taking or the actual taking over of the possession of lands by the Government, whichever occurred earlier. The landowners were further permitted to show the general rise in value of farm lands between February 23, 1943, the date of the filing of the War Powers Petition, and the date on which the declaration of taking was filed or the date when the Government took physical possession of the lands. Property owners were also permitted to show crops growing upon the property, the state of maturity of the crops, and the market value of such crops on the date of the filing of the declaration of taking or the taking of actual physical possession. Trial juries were further instructed that they should take into consid-

eration the rise in the value of farm lands between February 23, 1943, and the date of the filing of the declaration of taking or the taking of actual physical possession by the Government, and that they should also include in their verdicts any value added to the lands by the maturing or the matured crops growing thereon.

Your affiant further states that, in his opinion, the verdicts of the juries in these cases amply demonstrated that the juries did have in mind and did consider all of the elements of value covered by the Court's instructions. Tract No. P–1274, owned by Alex Parke, consisted of twenty acres of orchard land improved only with a two-room tenant house, packing shed, a well, and the ordinary irrigation facilities. At the time that possession of this tract was taken by the Government, the cherry crop growing upon the tract had been picked and marketed by the owner. The peach and apricot crops were matured but not harvested. The trial jury fixed $30,500 as the fair market value of the twenty-acre tract, inclusive of the fruit crop not harvested by the owner. The other verdicts rendered by trial juries followed much the same pattern.

The highest price fixed by any trial jury upon lands adjoining the irrigation districts, not susceptible of irrigation but otherwise comparable to lands within the districts, were $2.00 per acre.

(S) BERNARD H. RAMSEY.

Subscribed and sworn to before me this 14 day of Aug. 1947.

[SEAL] (S) LIONEL PUGMIRE,
Notary Public in and for
the State of Washington, residing at Yakima.

My commission expires: 3/8/48.

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